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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No. 75-1133

EHRET COMPANY, A CORPORATION,
Petitioner,

vs.

EATON YALE & TOWNE, INC., A CORPORATION,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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STATEMENT OF THE CASE

Respondent adopts Petitioner's statement of the case, but does not adopt Petitioner's description of the trial court's charge to the jury or Petitioner's analysis of the trial court's decision to grant a new trial.

At the first trial, Respondent tendered an instruction on how the jury was to interpret a written contract:

> In construing a written instrument, it should be read and considered as a whole. The intention of the parties is not to be gathered from detached portions of the instrument or from any one clause or provision standing by itself, but each part of the instrument should be viewed in the light of the other parts. One clause of the instrument may be modified or limited by another clause, and no word should be changed if, by considering the entire instrument, all parts of it may be interpreted to create one consistent plan.

This instruction was refused by the trial court. (T. 1. 529)* Instead of the rejected instruction, the trial court, gave the following instruction:

> The law does not say what extremely fair treatment means. That is for you to decide based on all the evidence which you find has a bearing on determining the intent of the parties. (T. 1. 648)

At the second trial at Respondent's request, the court gave an instruction on how the jury was to interpret a contract:

> In interpreting the agreement between Eaton and Ehret, you must determine the intention of the parties from the language they used. The meaning of the words the parties used is to be found by focusing on the words themselves and then drawing back and testing that meaning in the context of the entire agreement. This test must finally be read against the background of circumstances and the situation with which the parties were dealing.

In his opinion granting a new trial, the trial judge found the first verdict excessive because the jury, although it considered the totality of the circumstances affecting the parties' relationship, did not consider or measure that relationship against the language of the contract. (A. 4-6) By leaving out the content of the written contract, the jury failed in its duties and returned an excessive verdict. Under the circumstances, a new trial was required pursuant to F. R. Civ. P. Rule 59(a).

REASONS FOR DENYING THE WRIT

I. Plaintiff Was Not Deprived of Its Right to a Jury Trial

The Seventh Amendment to the Constitution specifically incorporates "the rules of the common law." Those rules give the trial judge the right to grant a new trial if he finds the jury's verdict to have been excessive or for other reasons. The common

* The abbreviation T. 1. refers to the transcript of the first trial. T. 2. refers to the transcript of the second trial; A. refers to Petitioner's Appendix.

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law has been codified in F. R. Civ. P. Rule 59. Indeed, exercising the power to grant a new trial pursuant to Rule 59, is "not in derogation of the right of trial by jury but is one of the historic safeguards of that right." *Aetna Casualty & Surety Co.* v. *Yeatts,* 122 F. 2d 350, 353 (4th Cir. 1941); 11 Wright & Miller, Federal Practice and Procedure, § 2806, page 49 (1973).

There is even some question of whether the trial judge's decision to grant a new trial can be reviewed at all, much less entirely disregarded. This Court's opinions state that the trial court's exercise of its discretion to grant a new trial is not subject to review:

> The rule that this Court will not review the action of a federal trial court in granting or denying a motion for a new trial for error of fact has been settled by a long and unbroken line of decisions; and has been frequently applied where the ground of the motion was that the damages awarded by the jury were excessive or were inadequate. The rule precludes likewise a review of such action by a circuit court of appeals. *Fairmount Glass Works* v. *Cub Fork Coal Co.,* 287 U.S. 480, 481 (1933); *Southern Ry.—Carolina Div.* v. *Bennett,* 233 U.S. 80, 87 (1914).

The commentators suggest that at present all eleven circuits do review the granting or denial of new trials to determine if the trial judge abused his discretion. (11 Wright and Miller, Federal Practice and Procedure, § 2820 (1973)) In this case, the Court of Appeals reviewed Judge McLaren's grant of a new trial and found that he had not abused his discretion:

> On appeal, the trial judge's opportunity to view the 'living courtroom' must be given great weight, especially when assessing the intent of the parties. We can find no abuse of discretion and accordingly affirm the judgment of the district court. (A. 16)

There is no support for Petitioner's assertion that the trial court "did not consider the same facts which the jury considered." (Petition, p. 5) The court did not, as Petitioner contends, ex-

clude from consideration the surrounding circumstances of the business relationship between the parties. (*Id.*) The court examined the business relationship in the light of the written agreement between the parties. (A. 4-6) The essence of Rule 59 and the common law is that the trial court must make an independent appraisal of the record in order to evaluate the jury's performance.

> Rule 59, Fed. Rules Civ. Proc. U.S.C.A., recognizes the old common-law principle that it is the duty of a judge who is not satisfied with the verdict of the jury to set aside and grant a new trial. As stated by Judge Parker, speaking for the court In Aetna Casualty & Surety Co. v. Yeatts (4th Cir.), 122 F.2d 350, 354, which also involved an appeal by a plaintiff who had, by failing to move for a directed verdict, precluded itself from challenging the sufficiency of the evidence to support the verdict, " 'To the federal trial judge, the law gives ample power to see that justice is done in causes pending before him; and the responsibility attendant upon such power is his in full measure. While according due respect to the findings of the jury, he should not hesitate to set aside their verdict and grant a new trial in any case where the ends of justice so require' " *Charles* v. *Norfolk & Western Ry. Co.*, 188 F.2d 691, 695 (7th Cir. 1951); 11 Wright and Miller, Federal Practice and Procedure, § 2803 (1973).

There is no evidence that the trial judge failed to make an independent examination; it is the independence of that examination the Petitioner questions. Petitioner ignores the historic duty of examination that the Seventh Amendment requires of trial judges. If the Petition were granted and if Petitioner's contention were accepted, the independent review function of the district court which has been a part of jury trials since before the Constitution was adopted would be eliminated and Rule 59 would have to be declared unconstitutional.

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II. Petitioner Has Waived His Right to Challenge the Remittitur by Refusing to Accept the Remittitur

Remittitur was an alternative presented to the Plaintiff by the Court. The Court had found the verdict to be excessive, under Rule 59 this finding is grounds for granting a new trial.* However, the trial court offered Petitioner an alternative, Petitioner could accept what the court believed to be the maximum verdict consonant with the evidence or have a new trial. Petitioner was then faced with a choice: whether to risk a new trial and face the possibility of a lesser verdict or accept the remittitur and challenge the remittitur procedures. Petitioner chose a new trial. The second jury awarded them approximately $20,000 less than the amount of the trial court's remittitur offer.**

Petitioner's present challenge to the remittitur issue is doubly faulty: Petitioner never accepted the remittitur nor did it raise the question of the proper timing of a challenge to the remittitur to the Seventh Circuit. If Petitioner had accepted a remittitur and, after entry of that judgment, had appealed to the Seventh Circuit, Petitioner would be in a position to raise the question of the supposed differences in procedure relating to remittitur among the various circuits. It did not do so, therefore, the remittitur disappeared; all that remained was the trial judge's determination that an excessive verdict required a new trial. When the case was appealed after the second trial, the Seventh Circuit was not asked to review its remittitur procedures and has not passed on this issue. This Court has often stated that in general it will not review issues that were not presented to the court be-

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* Respondent has always contended that Petitioner's jury argument at the first trial was calculated to and did arouse the prejudice of the jury. Although the trial judge rejected this argument in granting a new trial, he did admonish Petitioner's counsel before the closing argument at the second trial. (T. 2. 439-40.) The Court of Appeals did not reach the issue of Petitioner's attorney's conduct because it decided that the trial judge had rightly exercised his discretion.

** The trial court offered a judgment in the amount of $137,-880.75. (A. 7) The second jury's verdicts totalled $120,000.

low. *Wood* v. *Strickland*, 420 U. S. 308, 327 (1975); *U. S.* v. *ITT Continental Baking Co.*, 420 U. S. 223, 226 at n. 2 (1975).

Petitioner has had precisely the kind of review of the remittitur order which would be permitted under the present practice of any of the Courts of Appeal; that is, whether the trial judge abused his discretion in granting a remittitur.

Although Petitioner does not relate the relief it seeks to the New Rule 59(f) it proposes,* it seems that the present writ merely seeks the approximately $20,000 differential between the second jury's verdict and the remittitur order. Even if this Court adopted the proposed rule suggested by Petitioner, Petitioner would not be any better off than he was under the Seventh Circuit's procedures. The second trial is over and the Court of Appeals specifically refused to find that the first jury verdict was within the reasonable range. (A. 16) This Court's earlier opinions would have precluded all review of a trial court's decision on motion for a new trial. Ehret has had, perhaps, more review than that to which it is entitled; it has not prevailed. It has succeeded in convincing one jury. Since that time the trial judge, another jury, and the Court of Appeals have all looked at Ehret's claims. None of them have concluded that the $540,000 awarded by the first jury is supported by the evidence viewed as a whole.

For the foregoing reasons, the Petition for Certiorari should be denied by this Court.

Respectfully submitted,

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* We are not aware that a Petition for Certiorari is a proper procedure for suggesting changes in the Federal Rules of Civil Procedure.

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